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ALEXANDER L. STEVAS,
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No. 83-5315

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

EDWARD JAMES FRITZIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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60pp

QUESTION PRESENTED

Did the District Court unconstitutionally create a "psychological unavailability" exception to Petitioner's Sixth Amendment right to confront the witnesses against him, when, without hearing evidence, it permitted the deposition of a critical witness to be introduced at trial in lieu of requiring the witness's personal appearance?

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NO. 83-5315

IN THE

SUPREME COURT

OF THE UNITED STATES

EDWARD JAMES FRITZIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner, EDWARD JAMES FRITZIE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on May 1, 1984.

OPINION BELOW

The opinion of the Court of Appeals is reproduced in the Appendix hereto. (App. A).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on May 1, 1984. A timely petition for panel rehearing and suggestion for rehearing in banc was denied on August 14, 1984, by service of Order dated June 4, 1984. (App. B, pp. 9-12). The judgment was issued as mandate on August 10, 1984, withdrawn and reissued as mandate on September 13, 1984. (App. B, p. 10).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Defendant was indicted in the District Court of the Southern District of Florida for conspiracy (18 U.S.C. §371) and sale or receipt of stolen goods (18 U.S.C. §2315). On December 7, 1982, the government moved for authorization to take a deposition of Richard B. Flagg (App. C, p. 15), and defense counsel objected and requested an evidentiary hearing to determine whether the extraordinary relief of ordering a

deposition in a criminal trial was warranted (App. C, p. 26). Said motion was denied.

The only admissible evidence of the art theft was the testimony of the alleged victim, Richard Flagg, who did not appear at trial but his deposition testimony (pursuant to Rule 15, Fed. R. Crim. P.) was read to the jury. The professed explanation of the Rule 15 deposition was the witness's "state of extreme depression" (App. C, p. 17). the government's motion contained only a one paragraph letter from the witness's doctor (psychoanalyst) which provided no medical explanation that an appearance at trial would be deleterious to the witness's health (App. C, p. 19). No further showing of unavailability was required of the government.

REASONS FOR GRANTING THE WRIT

THERE IS AN URGENT NEED FOR THE COURT TO CLARIFY THE PRINCIPLES INVOLVED IN THIS CASE.

A. PSYCHOLOGICAL UNAVAILABILITY: THE DECISION BELOW IS FUNDAMENTALLY WRONG

This court has not sought to map out a theory of the confrontation clause that would determine the validity of all hearsay (exceptions), California v. Green, 399 U.S. 149, 162 (1970), but, on the other hand, constitutional limitations were set in Ohio v. Roberts, 448 U.S. 56 (1980), where the Court said that the test of Sixth Amendment unavailability was not met "unless the prosecutorial authorities made a good faith effort to obtain [the witness's] presence at trial." Id. at 74,

(emphasis in original) (quoting Barber v. Page, 390 U.S. 719, 724-25 (1968).

This rule applies to all cases of witness unavailability, but is moderated by the recognition that "[t]he lengths to which the prosecution must go to produce a witness...is a question of reasonableness." Id. (quoting from Justice Harlan's concurring opinion in California v. Green, 399 U.S. 149, 189, n.22 (1970). Therefore, the constitutional question appears to be at what point, if any, it is no longer reasonable to require the government to produce witnesses at the risk of their psychological health. To pose the question, underscores the inherent impossibility of positing an answer to a particular set of facts without a predicate evidentiary inquiry. The decision at trial, which permeates the decision below, that no evidentiary inquiry was necessary prior to determining witness

unavailability, was, and is, fundamentally wrong.

B. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEAL IN THE CASE OF WARREN V. UNITED STATES, AND SANCTIONS PROCEDURES OPPOSITE THOSE APPROVED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND THE NEW YORK COURT OF APPEALS.

The court recognized a type of witness unavailability which, to Petitioner's knowledge, has been expressly sanctioned in only three cases, one from the District of Columbia, one from California, and the other from New York. The courts in all three cases did so only after a hearing at which psychiatric testimony has been presented. Warren v. United States, 436 A.2d 821 (D.C. 1981); People v. Lombardi, 39 A.D.2d 700, 701, 332 N.Y.S.2d 749, 750-51 (1972), aff'd., 33 N.Y.2d 658, 348

N.Y.S.2d 980, 303 N.E.2d 705 (1973), cert. denied, 416 U.S. 906 (1974); People v. Gomez, 26 Cal.App.3d 225, 103 Cal.Rptr. 80, 83-84 (1972). The requirement that such unavailability be shown exists under the constitutional requirement of confrontation and equally so as a rule of evidence, since the declarant's testimony ordinarily is inadmissible as hearsay and can be admitted at the subsequent trial only out of necessity as an exception to the hearsay rule. See e.g., Motes v. United States, 178 U.S. 458 (1900); Government of Virgin Islands v. Aquino, 378 F.2d 540 (1967). The Courts which have recognized the "psychological unavailability" exception to the Confrontation requirement have done so by interpreting codified rules of evidence. Thus, the court below, by reference to Fed.R.Evid. 804(a), defined unavailability as "unable to be present or to testify at

the hearing because of death or then existing or mental illness or infirmity."

The Constitution itself makes no provision for exceptions to the right of Confrontation before the trier of the facts.

The Appellant in Warren v. United States had been found guilty of separate incidents of kidnapping and sexual assault. His convictions were reversed because of prejudicial misjoinder, and a re-trial was ordered. The government moved pre-trial to introduce the transcripts of the prior trial testimony of appellant's victims, Marilyn Reed and Linda Jenkins, both of whom had suffered some degree of psychic injury. The court cautiously extended the traditional definition of witness unavailability to include "psychological unavailability" of the type demonstrated in the case of Marilyn Reed, but to exclude the lesser degree of psychological infirmity demonstrated

by Linda Jenkins, after considering the limits of the Sixth Amendment's Confrontation Clause and of the Hearsay Exception for prior recorded testimony. Evaluating the testimony of two psychiatrists, one of whom he personally appointed to obtain an independent, second opinion, the trial court judge excused Reed from testifying because he found that Reed's testifying "would be likely to lead to a severe psychosis, even possible suicide" and would "be as likely to be a grave threat to her health and life as to compel the testimony of the individual with an acute heart condition."

It is noteworthy that the court required the appointment of a second independent psychiatrist to conduct an evaluation of Reed and Jenkins. Prior to the appointment of the second psychiatrist, Reed's psychiatrist had testified that Reed

was suffering from a severe mixed cycle neurosis with particular emphasis on depressive mood, phobic reaction and anxiety. He further testified that her depth of depression had reached suicidal levels and that suicidal tendencies were still present, that the effects of the violence she had suffered and the trauma of another court appearance would most likely shatter her fragile adaptation to society, and possibly lead to permanent psychological injury. Nevertheless, the trial judge appointed the second psychiatrist not because he discounted the testimony of the government's psychiatrist, but "rather because he was sensitive to the extraordinary nature of the government's motion and needed additional evidence to convince him that these witnesses should not be required to testify." 436 A.2d at 829. In appointing an impartial psychiatrist, he had followed local precedent

on psychological unavailability in a case which had required an independent psychiatrist be appointed notwithstanding the testimony of three other doctors who were intimately familiar with a witness's physical and mental condition. 436 A.2d at 827.

The Warren trial court was affirmed because the "**expert testimony**" relating to Reed's mental health established that there was both a high likelihood of temporary psychological injury, psychosis, and a possibility of permanent psychological injury.

The appeals court posed the following framework against which to evaluate the question of psychological unavailability:

1. The probability of psychological injury as a result of testifying;
2. The degree of anticipated injury;
3. The expected duration of the injury, and

4. Whether the expected psychological injury is substantially greater than the reaction of the average victim.

436 A.2d at 830.

In People v. Gomez, witness unavailability under the mental "illness or infirmity" standard was established by the expert testimony of two psychiatrists who testified that the witness was "very vulnerable to stress, had a tendency to psycho-motor seizures which were difficult to diagnose and treat," and that her present and future mental health could be injured by testifying before the court.

Similarly, in People v. Lombardi, a simple majority (3:2) upheld a court finding that it would endanger the witness's health to testify again, where testimony by the witness's psychiatrist satisfied the court that had the witness "been

required to appear and testify in person ...her mental and physical health would have been seriously jeopardized" and would have resulted in a "perhaps successful attempted suicide." Nevertheless, two of the Lombardi Judges would have required appointment of an independent, impartial psychiatrist:

> But another individual's liberty is here at stake and we must carefully balance the possible consequences of requiring the witness to testify against the potential prejudice to the defendant. Before granting the prosecutor's motion, the trial court should have first appointed an independent, impartial psychiatrist as requested by defendant's counsel or, at the very least, examined the witness himself in camera. 39 A.2d 703, 332 N.Y.S.2d 48 (dissenting opinion).

The dissent was of the opinion that no satisfactory showing of unavailability had been made.

The only other federal case which has applied the mental infirmity definition of

Fed. R. Evid. 804(a)(4) is United States v. Benfield, 593 F.2d 815 (8th Cir. 1979) where appellant's conviction was reversed because of a violation of a Sixth Amendment right to confront the government's witness face-to-face. The reversal did not result from unavailability, but, significantly the district court had taken expert psychiatric testimony on the issue of witness unavailability.

The right of confrontation provided in the Sixth Amendment is the right to be confronted before the trier of the facts. As early as Mattox v. United States, 156 U.S. 237, 242-3 (1895), this court stated:

> The primary object of the Constitutional Provision in question was to prevent depositions or ex parte affidavits...being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand

face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony whether he is worthy of belief.

In Parker v. Gladden, 385 U.S. 363 (1966), the court said:

As we said in Turner v. Louisiana, 379 U.S. 466, 472-473, 13 L.Ed.2d 424, 428, 429, 85 S.Ct. 546 (1965), the 'evidence developed' against the defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation of cross-examination and of counsel.

Confrontation affords bifurcated advantages: the first is the opportunity of cross-examination; the second is the personal appearance of the witness. California v. Green, 399 U.S. 149, 158 (1970). Dean Wigmore described it and says: "the judge and the jury are enabled to obtain the elusive and incommunicable evidence of witness's deportment while testifying and a certain subjective moral effect is produced

upon the witness." (Emphasis in treatise) V. Wigmore on Evidence, 3d ed., 1940, §1395.

This case is Barber v. Page, supra, with the single exception that instead of the prosecution, it is the court that failed to exercise good faith in ascertaining whether the witness was available for trial.

The Court of Appeals of the District of Columbia considered the issue presented by this case; its holding of "psychological unavailability" was premised upon the testimony of an independent psychiatrist appointed by the trial court. The New York Court of Appeals considered the issue presented by this case; its holding of "psychological unavailability" was premised upon the testimony of the witness's psychiatrist; two dissenting judges would have required the appointment of an

independent psychiatrist. The decision below holds that a one paragraph unilluminating letter from a witness's doctor which provides no medical explanation other than that a witness is "substantially" depressed is sufficient to eviscerate all of the safeguards that are built into the Sixth Amendment's Confrontation Clause. Unquestionably, there is a conflict of sufficient magnitude which calls for an exercise of this Court's power of supervision.

C. THIS CASE PRESENTS THE COURT AN OPPORTUNITY TO SET FORTH GUIDELINES TO GOVERN THE TAKING OF TESTIMONY IN A SPATE OF CHILD MOLESTATION PROSECUTIONS CURRENTLY SWEEPING THE COUNTRY.

In recent months, the newspapers of this country have been emblazoned with stories detailing countless accusations that men and women in every walk of life have taken advantage of young children with

tender sensitivities. See e.g., Timnick, Legal Tangle, Complex Issues Prolong Preliminary Phase of Mass Child-Abuse case in Calif. Court, The National Law Journal, September 10, 1984 ("Defense lawyers contend those accused of crimes have a right to confront their accusers" ....[despite psychiatric testimony]...."about the psychological effect of testifying in court on child abuse victims...."). The issue of the "psychological unavailability" of these young children to testify at trial is certain to arise, in one context or another, in every single one of these cases. Unless this court clarifies the applicable principles, innocent children will at worst be subjected to traumatic courtroom experiences, and at best be subjected to traumatic pre-trial battles.[1/]

[1/] See also, Agency Shuts Down Over Sex Assault Charge, Associated Press, August (cont.)

This case presents an arena free from the emotion-charged environment of the child-molestation cases.

1/ (cont.)

22, 1984 (Oklahoma); College Administrator and Wife Free on Bail After Molestation Charge, United Press International, August 22, 1984 (New York); Couple Charged with Child Molestation, United Press International, August 10, 1984 (Georgia); Daycare Center Employee Charged with Sexual Abuse of Pupil, United Press International, August 17, 1984 (Maryland); Funds Sought for Molestation Victims, United Press International, August 9, 1984 (South Carolina); Grand Jury Indicts in Children's Heater Probe, United Press International, August 23, 1984 (Minnesota); Miami Couple Charged with Abusing Children, New York Times, August 25, 1984; Minister Sentenced in Molesting Case, United Press International, August 31, 1984 (Indiana); Petition Drive Targets Child Molesters, United Press International, August 14, 1984 (Virginia).

CONCLUSION

It is therefore respectfully suggested that the Petition for a Writ of Certiorari should be granted and the decision of the Court below be reversed.

Respectfully submitted

STEPHEN V. WILSON

Counsel for the Petitioner

JORDAN P. WEISS

OF COUNSEL

Dated:

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-5315
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD JAMES FRITZIE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(May 1, 1984)

Before HATCHETT, ANDERSON and CLARK,

Circuit Judges.

PER CURIAM:

Appellant Edward Fritzie was convicted in the United States District Court for the Southern District of Florida for conspiracy and the sale or receipt of stolen paintings. 18 U.S.C.A. §§371, 2315 (West 1970). On appeal, he argues that (1) the introduction of deposition testimony of the burglary victim pursuant to Fed.R. Crim.P. 15 was an abuse of the trial court's discretion in violation of his Sixth Amendment right to confront witnesses; and (2) comments by the prosecutor in closing argument require reversal.

Concerning the deposition testimony, Fed.R.Crim.P. 15 allows the use of depositions at trial if the witness is unavailable.[1] The court did not abuse its discretion by ruling that deposition was the appropriate means of obtaining the testimony of Milwaukee resident Richard Flagg,

the elderly and infirm man from whom the paintings were stolen. Flagg's doctor advised that travel to Florida for trial was not possible due to his age and his state of extreme depression. When his condition did not improve after the court granted one continuance, the Rule 15 motion was granted. Flagg's absence at trial did not violate Fritzie's right to confront witnesses, because Fritzie confronted the witnesses via cross-examination at the deposition hearing. See California v. Green, 399 U.S. 149, 165 (1970); United States v. Tunnell, 667 F.2d 1182, 1187 (5th Cir. 1982); United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974).[2]

---

[1] "Unavailability," as defined by Fed.R. Evid. 804(a), includes a situation in which the declarant "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."

[2] The right to cross-examine the deponent was sufficient here to avoid violation of the Confrontation Clause, but it might not be in a case where the witness was not shown to be unavailable. Barber v. Page, 390 U.S. 719, 726 (1968).

Appellant attacks various comments made by the prosecutor in his closing argument. First, he claims that the prosecutor improperly drew attention to Fritzie's failure to take the stand in his own defense. Having examined the record, we conclude that the comments were not such that "the prosecutor's manifest intention was to comment upon the defendant's failure to testify . . . or the remark was such that the jury would naturally and necessarily take it to be a comment on the failure of the defendant to testify." Williams v. Wainwright, 673 F.2d 1182, 1184 (11th Cir. 1982).

Appellant also complains that the prosecutor stated: "as jurors here in South Florida, we need not be told the role of crime plays in our lives." This brief statement appeared in the context of the prosecutor's attempt to rebut a defense suggestion that the undercover agent had initiated the crime. The prosecutor was indicating the justification and need for undercover activity. In context, the remark was not inflammatory so as to prejudice substantial rights of the defendant. Unitsed States v. Dorr, 636 F.2d 117, 120 (5th Cir. Feb. 6, 1981).[3] See also United States v. Kopituk, 690 F.2d 1289, 1342-43 (11th Cir. 1982).

---

[3] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. 1209.

Finally, during rebuttal, the prosecutor stated:

> Mr. Sale [defense counsel] mentioned the case presented against Ed Fritzie was a phony case. I can assure you this case was not a phony case. The FBI had much better things to do than to present a case to you that is phony. They don't need it. They have other cases out there that they could bring to you, if in fact the case is phony.

Fritzie claims that this argument improperly sought to bolster the government by suggesting that the case would not have been brought were it not solid.

In United States v. Garza, 608 F.2d 659 (5th Cir. 1979), our predecessor court reviewed a closing argument where the prosecutor explained that the government had no interest in convicting the wrong person and that he himself would quit his job if he ever thought he had successfully prosecuted an innocent man. The court ruled this argument improper because it "presumed

that the whole government apparatus, and the prosecutor individually, had reached a determination of the defendant's guilt before the trial and implied that the jury should give weight to this fact in making its determination." Id. at 665. The court recognized that isolated statements might not be enough to require reversal, but found that the foregoing, together with other improper arguments, required a re-trial in that case. See also, United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972) (error for prosecutor to say that there would have been no prosecution had the defendant not committed a crime).

In the instant case, the prosecutor's assertion that he would not bring "a phony case" does not communicate that he had reached a decision as to Fritzie's guilt. Coming in a rebuttal argument, it was a

response to the defense's assertion that "the entire government case is a phony." The prosecutor was entitled to give a fair response to the implication that the government had intentionally prosecuted an unsupported case. United States v. Hiett, 581 F.2d 1199, 1204 (5th Cir. 1978). The response was limited to the scope of the appellant's attack, see United States v. Garza, 608 F.2d at 665 n.4, and was not improper under these circumstances.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5315
Non-Argument Calendar

D.C. Docket No. 82-00434-CR-CA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD JAMES FRITZIE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before HATCHETT, ANDERSON and CLARK,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under

submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: May 1, 1984
For the Court: Spencer D. Mercer, Clerk

ISSUED AS
MANDATE: AUG 10 1984

By: /s/
Deputy Clerk

REISSUED AS
MANDATE SEP 13 1984

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

August 14, 1984

Robert M. March, Clerk
U.S. District Court
Southern District of Florida
301 N. Miami Avenue
Miami, Florida 33128

Attn: Ms. Sylvia Reyes

Re: 83-5315 USA v. EDWARD JAMES FRITZIE
(U.S. District Court No. 82-434-CR-CA)

Dear Ms. Reyes:

This will confirm my conversation with you on August 13, 1984, in regards to the mandate issued in the above stated case. The mandate in this matter was issued in error and is being recalled. Counsel for Mr. Fritzie was not served with a copy of this court's order denying petition for

rehearing and was therefore not given an opportunity to file for stay of the mandate.

I apologize for any inconvenience this may have caused any of the parties.

Sincerely,

SPENCER D. MERCER,
CLERK

By: /s/
Warren A. Godfrey
Operations Manager

WAG/sh

cc: Stephen V. Wilson
Roberto Martinez

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-5315

FILED
U.S.COURT
OF APPEALS
ELEVENTH
CIRCUIT

JUN - 4
1984

SPENCER D.
MERCER
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD JAMES FRITZIE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion MAY 1, 11 Cir., 1984, ___F.2d___).
(JUN 4 1984)

Before HATCHETT, ANDERSON and CLARK
Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor other Judge

in regular active sercice on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

. . . .

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO.
	)	82-434-Cr-CA
SAM LOUIS LORIA, et al	)	
	)	

MOTION FOR CONTINUANCE AND
AUTHORIZATION TO TAKE DEPOSITION

The United States, by and through its attorney, Neal B. Shniderman, Esq., Assistant United States Attorney, respectfully moves this Court for a continuance and for authorization to take the deposition of Richard E. Flagg. In support of this Motion, the United States alleges:

1. Trial on the instant case is scheduled currently to commence during the two week period beginning December 13, 1982.

2. The instant case involves in essence allegations that the defendants conspired to receive and did receive approx-

imately 70 stolen art objects which were part of interstate commerce. The government will contend that Richard B. Flagg had possession, care, custody, and control of the art objects in his office in the Milwaukee, Wisconsin area. Sometime during January or February 1981, these art objects were stolen, unlawfully converted, and taken from Mr. Flagg's office, in Wisconsin and transported to Florida. The United States believes that Mr. Flagg will identify the objects, testify regarding his possessory interest, his failure to authorize the removal of the objects, and his valuation of the objects at the time of the theft. Mr. Flagg will further testify regarding his efforts to assist the authorities in the recovery of the art objects.

3. On Friday, December 3, 1982, the undersigned Assistant United States Attorney received telephonic notification from Stephen E. Kravit, Esq., Mr. Flagg's attorney, that Mr. Flagg was unable to travel to Miami for trial due to his advanced age, 77, and certain medical problems.

4. On Monday, December 6, 1982, the undersigned received written communication from Mr. Kravit regarding Mr. Flagg's status. A copy of that letter is attached.

5. On December 6, 1982, the undersigned had a telephone conversation with Dr. Pollack, Mr. Flagg's physician. Dr. Pollack stated that Mr. Flagg should be in a position to testify in approximately 60 days. At the present time, Mr. Flagg is experiencing a state of extreme depression and is receiving medication for this

condition.

6. Rule 15 of the Federal Rules of Criminal Procedure authorizes the taking of a witness' deposition for preservation and use at trial.

Accordingly, the United States respectfully requests this Court to grant a 60 day continuance, which is excludable time pursuant to 18 U.S.C. §3161(h)(3)(A), and to authorize the taking of Mr. Flagg's deposition. In the event that Mr. Flagg is unable to testify at the conclusion of this time, the government will be in a position to offer his testimony through the deposition.

Respectfully submitted,

STANLEY MARCUS
UNITED STATES ATTORNEY

By: /s/
NEAL B. SHNIDERMAN
Assistant United States Attorney
305/350-5435

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December 3, 1982

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780 N. Water
Milwaukee, Wi. 53202

Dear Mr. Kravit:

My patient, your client Mr. Richard Flagg, informes me that he has to appear at a hearing in Florida on the 13th of December. I have to report that this patient, who has been substantially depressed and anxious has had a relapse of his symptoms in the last two weeks and I have urged him to cancel any trips away from home. He is now under active medical attention with me and I hope you can arrange to either postpone his trip or help him arrange affairs through some deposition of his testimony. He is definitely in no position

to trave anywhere.

Thanking you in advance for your co-operation.

Sincerely yours,

/s/

Saul Kenneth Pollack, M.D.

SKP:mb

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

CASE NO.
82-434-Cr-CA

v.

SAM LOUIS LORIA, et al

Defendants.

/

RENEWED MOTION TO TAKE DEPOSITION

The United States by and through the undersigned respectfully renews its motion for authorization to take the deposition of Richard Flagg.

The United States has received the attached report, dated January 20, 1983 regarding Mr. Flagg's condition. His condition has not improved, thereby necessitating the taking of his deposition.

Respectfully submitted,

STANLEY MARCUS
UNITED STATES ATTORNEY

By: /s/
NEAL B. SHNIDERMAN
Assistant United States
Attorney 305/350-5435

GODFREY & KAHN, S.C.
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 273-3500
TWX 810-262-3197

January 20, 1983

Mr. Neal Schneiderman
Assistant U.S. Attorney
U.S. Attorney's Office
155 South Miami Avenue
Miami, Florida 33130

Re: Richard B. Flagg

Dear Mr. Schneiderman:

Enclosed please find Dr. Pollack's latest review of Mr. Flagg's health. Quite clearly, he will not be able to travel in the foreseeable future due to his deteriorating condition of depression.

I can tell you that Mr. Flagg is extremely agitated and worried about this situation which Dr. Pollack tells me is contributing to his other problems.

I look forward to hearing from you with your thoughts on this problem.

Very truly yours,

GODFREY & KAHN, S.C.

/s/

Stephen E. Kravit

SEK:cat
Enclosure

CC: Dr. Saul Kenneth Pollack
Gabrielle Pfeiffer

SAUL KENNETH POLLACK, M.D.
100 North Water Street
MILWAUKEE, WISCONSIN 53202
(414) 276-1281

January 19, 1983

Attorney Stephen Kravit
c/o Godfrey & Kahn SC
780 N. Water Street
Milwaukee, Wisconsin 53202

Dear Mr. Kravit:

In view of my last report to you regarding Mr. Flagg's health, I feel I must tell you that conditions are not good. Actually, his condition has somewhat decompensated and several of us physicians are struggling with an attempt to get a remission from his depression, something which previously has been successful. There is no opportunity at the present time for him to take a trip and I'm suggesting that if you can, to arrange a postponement for the next two or three months.

I will be very glad to keep you posted.

Very sincerely yours,

/s/

Saul Kenneth Pollack,
M.D.

SKP:mb

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 82-434-Cr-CA

UNITED STATES OF AMERICA	DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION FOR CONTINUANCE AND AUTHOIRZATION TO TAKE DEPOSITION
v.	
EDWARD JAMES FRITZIE	

COMES NOW the Defendant, EDWARD JAMES FRITZIE, and respectfully submits this Response in opposition to the Government's Motion for Continuance and Authorization to Take Deposition. In support of this Response, the Defendant alleges:

1. Trial of the instant case is scheduled to commence during the two-week period beginning December 13, 1982.

2. According to the Government's Motion, an essential witness, Richard B. Flagg, is unable to travel to Miami for trial "due to his advanced age, 77, and

certain medical problems". Those medical problems are described in the Government's Motion as "a state of extreme depression".

3. Defendant respectfully objects to a continuance of the trial because the Government has failed to make a sufficient showing which the Court should require before ordering a deposition due to exceptional circumstances as is required by Rule 15 of the Federal Rules of Criminal Procedure. It should be noted that the Defendant takes issue with some of the proffered testimony which this witness will offer at trial. Accordingly, Defendant submits that the Government should be required to make a more definite showing at an evidentiary hearing before the Court grants the extraordinary relief of ordering a deposition in a criminal case.

WHEREFORE, Defendant EDWARD JAMES FRITZIE, respectfully requests this Court to deny the Government's Motion or in the alternative, to require the Government to demonstrate the witness' unavailability prior to permitting a deposition in lieu of live testimony of an essential witness.

Respectfully submitted,

BIERMAN, SONNETT, BEILEY,
SHOHAT & SALE, P.A.
Attorneys for Defendant FRITZIE
200 S.E. First Street, #500
Miami, Florida 33131

By /s/
JON A . SALE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by (HAND) this (9th) day of December, 1982 to NEAL B. SHNIDERMAN, ESQ., Assistant U.S. Attorney, 155 South Miami Avenue, Miami, Florida 33130-1693 and to all counsel of record.

By /s/
JON A. SALE